

**Village of Irvington
Zoning Board of Appeals**

Minutes of Meeting held June 24, 2003

A meeting of the Zoning Board of Appeals of the Village of Irvington was held at 8:00 P.M. on Tuesday, June 24, 2003, in the Village Hall, Irvington, N.Y.

The following members of the Board were present:

Louis C. Lustenberger, Chairman
Paul M. Giddins
Robert Myers
Bruce Clark
George Rowe

Mr. Lustenberger acted as Chairman and Mr. Giddins as Secretary of the meeting.

There were two matters on the agenda:

Case No.

2003-14 Craig Ritchie – 16 North Eckar Street (Sheet 5, Block 211; Lot 24A2)

The Applicant appeared.

This matter was continued from the May, 2003 meeting to permit a member of the Board to inspect the property prior to voting. At the May, 2003 meeting, the Applicant filed a letter from the Village Administrator confirming that, on April 21, 2003, the Mayor and the Trustees approved the Applicants' request for a waiver from the Interim

Development Law of the Village of Irvington 2003 (building moratorium) so as to permit the within application for a variance to be heard.

At the May, 2003 meeting, in lieu of the verified statement of compliance with the notice provisions of § 224-98(A) of the Irvington Zoning Ordinance (the “Code”), the Applicant filed the applicable proofs of service. As this was a continued matter, new proofs of service, and a new letter from the Village administrator, were not filed.

The Applicant sought a variance from the provisions of §§ 224-11 (side yard setbacks) and 224-13 (coverage) to permit the construction of stairs and a deck at the rear entrance to the applicant’s building.

The Board reviewed drawings submitted by the Applicant and discussed the extent and nature of the variances requested. The Chairman noted that properties on the streets intersecting Main Street consist of lots that are almost entirely non-conforming due to amendments to the Code during the years following the development of those streets. The Chairman further noted that in considering this application the Board took note of this fact, which would essentially “freeze” all of those properties in that neighborhood, permitting no additions or alterations of any kind without a variance, and in many cases producing an unwarranted hardship to the property owner.

The Board noted that the addition of a deck to the rear of the Applicant’s house would be a relatively modest addition to the existing structure and would be entirely screened from the contiguous property to the north because of the side of a structure on that property that backs up on the boundary between the Applicant’s lot and the contiguous lot, and forms what is essentially a wall along the boundary line.

After weighing the applicable factors, the board concluded that the benefit to the Applicant from granting the variance outweighed any detriment to the health, safety and welfare of the neighborhood or community. The Board also found that granting the variance would not produce an undesirable change in the character of the neighborhood or a detriment to nearby properties, that the benefit sought by Applicant could not feasibly be achieved by any method other than a variance. The Board further concluded that the requested variances would not adversely affect the physical or environmental conditions of the neighborhood or district and that the hardship necessitating the request for the variances, while self-created, did not for that reason alone outweigh the factors favoring the variances.

There was no opposition to the application.

The Chairman then moved that a vote be taken on the application. The motion was seconded and thereafter the Board voted on the Applicant's request for a variance. The Board voted unanimously to grant the request for a variance.

2003-18 Dennis and Cynthia Haines – 3 Hudson Road East (Sheet 15, Lot P121)

Applicant Dennis Haines appeared.

This matter was a rehearing of the Applicants' application for a variance from the provisions of § 224-51 of the Code (Broadway Buffer), to permit the continuation of a wooden fence within the Broadway Buffer. The Chairman noted that the Board had denied an earlier application for this variance, and that the Applicant had filed an Article 78 proceeding in the New York State Supreme Court, Westchester County, seeking reversal of the Board's prior decision and the issuance of a permit for the fence. The

Supreme Court, Westchester County, annulled the Board's decision, stating that there was an insufficient record of the Board's consideration of the criteria for the granting or denial of a variance.

Mr. Lustenberger commenced the proceeding by referring to the April 2, 2003 decision of Justice Linda S. Jamieson. Reading from the decision, he said that the court had found that "the ZBA's minutes do not contain sufficient detail to enable the Court to determine if the ZBA considered and balanced the specified elements" [of Village Law § 7-712b(3)(b)] and that "it must be emphasized that the ultimate outcome of the variance request remains within the discretion of the ZBA provided that the record contains substantial evidence to support it." Mr. Lustenberger stated that the Board was therefore rehearing the application on what was essentially a blank slate.

Mr. Haines stated that he disagreed with this characterization of the order and that the Court had remanded the matter to the Board for further proceedings "pursuant to this order." When shown the order, he acknowledged that it did not contain such a specific remand.

Mr. Lustenberger stated that the Board would undertake the basic examination that Village Law § 7-712b required of all area variance hearings, namely, balancing the benefit to the applicant from the granting of the variance against any detriment to the health, safety and welfare of the neighborhood or community that might flow from such grant, and that in so doing, the board would examine each of the five criteria required to be considered by the Board by § 7-712b.

Mr. Haines stated that he did not agree with this interpretation of what was required of the Board. He asked that the entire record of his Article 78 Proceeding be

made a part of the record on this application, to which the Board agreed. Thereafter, the entire record of the Article 78 proceeding was made part of the record of this matter.

Thereafter, Mr. Lustenberger stated that he would go through each of the § 7-712b criteria and invited other Board members to comment as well.

1. Whether the granting of the requested variance would produce an undesirable change in the character of the neighborhood or a detriment to nearby properties.

Mr. Lustenberger stated that he believed the relevant “neighborhood” for passing upon any attempt to vary the requirements of the Broadway Buffer was all of Broadway, for its entire length from north to south through Irvington, since the Buffer ran for Broadway’s entire length. As support for that definition of the “neighborhood” and to define its character, Mr. Lustenberger put into the record page 36 of the 1988 Report to the Irvington Trustees of the Irvington Land Use Review Committee, which states that there are “three corridors [that] have special importance to the quality of life in and ambience of Irvington,” the first of which it identifies as “the tree-lined spacious character of Broadway north and south of Main Street.” Mr. Lustenberger stated his belief that the character potentially affected by the application was Broadway’s spacious and tree-lined borders.

Mr. Haines disagreed with Mr. Lustenberger’s definition of the neighborhood. He stated that the basis for his disagreement was the fact that he had sent notices of this proceeding only to those property owners who lived within 200 feet of his property, as required by the Village’s Zoning Ordinance. Mr. Lustenberger replied that the notice requirement did not define the neighborhood, pointing out that in its prior proceedings the Board had, for example, defined Cedar Ridge and Mathiessen Park as neighborhoods

relevant to proceedings in those areas, although notices in each case went to only a small number of property owners within those neighborhoods.

Mr. Haines then stated that he had asked his neighbor, Mr. Dobbs, to appear at the hearing. Mr. Dobbs introduced himself to the Board and stated that he supported the application. He said that he lived across Hudson Avenue from Mr. Haines and that his property bordered Broadway, as did Mr. Haines'. He said he did not object to Mr. Haines' fence and that he was considering putting in a similar fence along Broadway, as it would prevent youths from Mercy College and elsewhere from loitering on his property, and would provide security for him and his family. The Board thanked Mr. Dobbs for his comments.

Mr. Lustenberger then addressed the issue of whether the requested variance would constitute a detriment to other property owners. Mr. Lustenberger stated that he did not believe that the stone walls cited in Mr. Haines' Article 78 Petition as precedent for his fence were, in fact, precedent, because the Village had identified stone walls as a scenic resource to be preserved, but had never done so for wooden fences of the type at issue in this case. Mr. Lustenberger offered for the record the proposed amendment to the Village Code, Chapter 184, Article I, stating that "stone walls constitute a scenic resource, and it is the purpose of this article to protect this resource."

Mr. Lustenberger also stated that he did not think wooden fences perpendicular to Broadway were precedent for Mr. Haines' fence, as claimed in the Article 78 Petition, because they did not produce the tunneling effect that a stockade fence running along Broadway, like Mr. Haines' fence, did. Mr. Lustenberger stated his belief that the erection of more wooden fences similar to Mr. Haines' fence would produce the

foregoing “tunneling” effect. Mr. Haines disagreed with Mr. Lustenberger’s view that more wooden fences would create such a tunneling effect. Mr. Lustenberger noted that the only place on Broadway that wooden stockade fences such as Mr. Haines’ appeared is in a four-tenths of a mile stretch of south Broadway immediately north of the Dobbs Ferry town line, where there were four such fences in addition to Mr. Haines’. Two of these four predate the enactment of the Broadway Buffer. The other two, on the Narayan and Giamelli properties, were discussed separately, as described below.

Mr. Lustenberger then addressed the “nearby properties” mentioned in the Village Law and said that there were two immediately relevant to this proceeding. He noted, however, that the manner in which the Board disposed of variances on these two properties did not necessarily create a precedent for the Haines property. Mr. Lustenberger stated that, as the Board noted in its Memorandum in opposition to the Article 78 Petition, a denial of a variance in one case and the granting of a variance in another similarly situated case does not, of itself, constitute impermissible arbitrariness on the part of the Board. Nevertheless, the Board specifically addressed its prior decisions concerning two nearby property owners who had requested and obtained variances for fences within the Broadway Buffer.

a. Giamelli.

Mr. Lustenberger stated his belief that the Giamelli matter is distinguishable from the Haines case primarily because Mr. Giamelli stated at the May 16, 2000 hearing on his application for a variance that the Village had previously granted him a permit for a fence in the location that he was proposing. Mr. Lustenberger asked that the Board’s May 17,

2000 decision recording Mr. Giamelli's statements be made a part of the record herein.

Mr. Lustenberger noted that whereas Mr. Giamelli had previously received permission for a fence from the Village, Mr. Haines erected his fence within the Broadway Buffer without seeking permission of any kind.

In addition, the Board held three separate hearings on the Giamelli property, dealing with the location of a stone wall, a berm to be constructed between Mr. Giamelli's house and Broadway, and the planting of vegetation on the berm, the fence being the final addition to this landscaping. Under these circumstances, Mr. Lustenberger noted, the Board believed the fence to be an appropriate addition to the required landscaping. No such process occurred on the Haines application since Mr. Haines' fence had already been built before he applied for a variance.

Mr. Haines disagreed with the Board's stated rationale in deciding the Giamelli case. He stated his belief that it is arbitrary and capricious for the Board to deny his application in light of the Board's approval of similar fences on the Giamelli and Narayan properties.

b. Narayan

Mr. Lustenberger stated that the fence on the Narayan property appeared to have predated the enactment of the Broadway Buffer, but that there was no clear evidence in this regard and that therefore the Board had treated the Narayan application for a variance to maintain the fence as a *de novo* application for a variance. Mr. Lustenberger said that the Narayan case appeared to be distinguishable from this one because, as stated in the Narayan decision, that fence is "partially screened from Broadway by existing trees and stands behind an already existing stone wall within the Broadway Buffer." More

particularly, in that decision, the Board stated that “[I]t was clearly demonstrated at the hearing that the fence is needed to prevent trespassing on [the] property.” Mr.

Lustenberger asked that the Board’s June 21, 2000 decision in the Narayan matter be made a part of the record herein

Mr. Lustenberger contrasted the Narayan’s evidence of trespassing with Mr. Haines’ stated need for security, namely, police activity on Broadway at the location of his property. Mr. Lustenberger read from Mr. Haines’ description of that activity as set forth in paragraph 12 of his Article 78 Petition, wherein he states that the flat stretch of Broadway opposite his house is “frequently” used by “Village law-enforcement personnel” to stop “vehicles entering the Village from Dobbs Ferry at a high rate of speed” creating a “heightened risk of entry onto [the Haines’ property] by persons seeking to avoid law enforcement.”

Mr. Lustenberger said that he did not understand how such could be the case because Mr. Haines’ property was less than a tenth of a mile from the Dobbs Ferry line, and he did not see how the police could apprehend a vehicle within that distance. Mr. Lustenberger further stated that he did not believe Mr. Haines’ complaint of “police activity” was as significant as the actual trespasses described in the Narayan application. Mr. Haines replied that the police make vehicle stops of cars and vans, and arrests, in the vicinity of his house, and that he and his wife lived in fear. Mr. Haines also stated that there was one instance in which a van with out-of state plates was parked in his driveway apparently following apprehension by the police. Mr. Lustenberger said that he had contacted the Irvington police department to attempt to determine the number of such instances, but had been told that the department does not maintain records of “pull

overs.” While it does maintain records of tickets issued, it does not do so for specific sections of Broadway, such as that adjacent to the Haines’ property. Mr. Myers said that he lived a block off Broadway and was not aware of police activity in the Haines’ location, to which Mr. Haines replied that Mr. Myers was too far away to adequately observe such activity. Mr. Lustenberger said that he passed the Haines property four times per day while going to and from his office in Dobbs Ferry, and had been doing so for four years, and had not observed any such activity in the vicinity of Haines of the Haines’ property. Mr. Haines replied that his concern was with the “possibility” of such activity.

2. Whether the benefit that applicant seeks can be achieved by some method, feasible for the applicant to pursue, other than an area variance.

The discussion of this criterion centered on whether the applicants could feasibly plant vegetation in place of a fence to screen their property from Broadway. Mr. Haines stated at the prior hearing on the requested variance that his contractor, J & J Landscaping, had told him that the shade from large trees near the fence made it impossible to grow vegetation there, and Mr. Haines so stated in his Article 78 Petition and again at this hearing.

Mr. Lustenberger stated that when this Board granted a variance to the builder of the Haines’ house, to permit the installation of a driveway between the house and Broadway within the Broadway Buffer, it had conditioned the grant on the builder’s planting vegetation between the driveway and Broadway, which the builder had done and which was still there. Mr. Lustenberger asked that the Board’s May 20, 1998 decision in that case be made a part of the record herein and noted that the minutes of the Board’s

May 19, 1998 meeting, at which it imposed this screening condition, were attached to Mr. Haines' Article 78 Petition as Exhibit 4. Mr. Lustenberger noted that that screening, in the form of arborvitae, had been installed and now existed between the driveway and the Haines' fence.

The Applicant stated that the arborvitae installed by the builder was spaced approximately 4 feet apart and did not provide the security and privacy that a fence provided.

Mr. Lustenberger stated that he took pictures of the existing screening at the property, and he distributed the photographs he took to the Board. Mr. Haines objected to Mr. Lustenberger's entering his property without consent to take the pictures and requested that the record note his objection. Mr. Lustenberger noted that he rang the doorbell before coming on the property and that nobody appeared to be home. Mr. Haines thereafter distributed to the Board pictures of the vegetation along the eastern side of his fence, away from Broadway, which he had taken to demonstrate its condition. Mr. Haines stated that many of the arborvitae have died due to lack of light, and that no vegetation will grow in the vicinity of the fence. He further stated that he has been unsuccessful in getting anything to grow in the dense shade near the fence.

Mr. Lustenberger stated that he had talked to the owner of a landscaping business who did work in the area, Mr. Vincent Civitano, about the availability of vegetation that would grow in shade, and had been advised that Manhattan Euonymus would do so. Mr. Lustenberger said he had also obtained from the internet other examples of shade-resistant vegetation and suggested that Mr. Haines could use that avenue to locate such vegetation. Mr. Lustenberger stated his belief that the Applicant had not sufficiently

explored the possibility of installing other forms of vegetation instead of the fence. Mr. Haines replied that he had not tried to plant other types of vegetation, that he is convinced nothing else will grow in the area of the fence, and that he should not be required to go to the time and expense of exploring the installation of alternative vegetation.

Mr. Lustenberger asked that the minutes of the Architectural Review Board's October 15, 2002 meeting, at which they reviewed the fence at issue here, be made a part of the record herein, and noted that at that meeting, according to the minutes, "members of the ARB [had] felt that trees would grow in this location if properly cared for." Mr. Haines replied that the ARB members were not experts in this area and that Exhibits 7B and 7C to his Article 78 petition were evidence that the vegetation in the vicinity of the fence is dying.

3. Whether the requested variance is substantial.

Mr. Lustenberger stated that the Irvington Zoning Ordinance defines the Broadway Buffer as "the area . . . within 50 feet of the curblane of Broadway." Ordinance § 224-51.B. Mr. Lustenberger stated that the Board would take as a fact that the Haines' fence was 17 feet from the curblane, as stated in ¶ 4 of Mr. Haines' January 16, 2003 reply in support of his Article 78 Petition, to which Mr. Haines agreed. At that location, Mr. Lustenberger said that he thought the fence was a substantial variance from the Ordinance's requirements because it cut off two-thirds of the Buffer, leaving only one-third of the fifty foot Buffer between the fence and Broadway. Mr. Haines pointed out that the Board had approved a driveway in the Buffer, and that the driveway comprised much of the two-thirds intrusion into the Buffer, to which Mr. Rowe commented that the driveway was flat and did not produce the same effect as a fence.

Mr. Lustenberger said that the measure of substantiality was not confined to objective measurements but also included the degree of the effect of the variance on the character of the neighborhood.

4. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

There was no discussion of this criterion other than to note that at the prior hearing, interpreting this criterion as one that calls for an impact on the physical topography or environment such as erosion, contamination or destruction, the Board had concluded that the applicant's fence did not have any such impact.

5. Whether the alleged difficulty giving rise to the request for a variance was self-created.

Mr. Lustenberger said that it appeared to him that the difficulty in this case was clearly self-created because the Haineses must be presumed to have known of the zoning laws when they purchased their house and constructed their fence, noting that the Board had cited case law in its opposition to the Article 78 Petition holding that a prospective purchaser is chargeable with knowledge of the applicable zoning law. Mr. Haines responded that it was not reasonable for him to be expected to be familiar with the Village zoning laws at the time he purchased his house.

At the conclusion of the forgoing review of criteria under Village Law § 7-712b, Mr. Lustenberger asked Mr. Haines if there was anything Mr. Haines would like to add. He replied that he believed that the Board was elevating aesthetics over the rights of the property owner, and that it was not unreasonable for him to have constructed the fence in question. Mr. Rowe then asked if there were not alternatives that might be explored as a

way of resolving this matter, in particular, whether Mr. Haines could not expand upon the stone wall that now sits between his fence and Broadway. Mr. Haines replied that he did not see why he should be put to the cost of increasing the stone wall, which he said would be expensive. Mr. Rowe said that he had installed stone walls around his property and did not consider the cost to be prohibitive. Mr. Clark asked the Applicant if he had considered any other type of wooden fence, with slats farther apart. Mr. Haines replied that he had not, and that he never realized the type of fence could be an issue later on. Mr. Myers said it was not appropriate to suggest alternatives, but that the Board should confine itself to ruling upon the application as presented. Mr. Giddins said that he would like more time to consider the matter and to review the Article 78 papers. Therefore, the matter was adjourned to the Board's July 22 meeting to give Board members further time to consider the application.

There being no further business, the meeting was, upon motion duly made and seconded, unanimously adjourned.

/s/ Paul M. Giddins
Paul M. Giddins